ASIA CORPORATION LTD. v. S. T. RAMAKRISHNAN AND LIM KEAN SENG BOTH TRADING UNDER THE STYLE OF MALAYAN CORPORATION.

[Court of Appeal (Willan, C.J., Pretheroe and Moor, JJ.) July 7, 1949]

[F.M. — Civil Appeal No. 2 of 1949]

Rules of the Supreme Court, Order 11 Rule 1 — Service of writ outside jurisdiction — Claim for damages for breach of contract — Contract made within jurisdiction — Powers of Court of Appeal on appeal — Courts Ordinance, 1948, S. 38 (1).

In this case the Assistant Registrar had given leave to serve the writ of summons outside jurisdiction under Order 11 Rule 1(e)(iii) of the Rules of the Supreme Court on the ground that the claim for damages was in respect of a breach committed within the jurisdiction. On appeal before the Court of Appeal fresh evidence was given which showed that the breach of contract was probably committed in Negapatam, India. The fresh evidence further showed that the final acceptance which constituted the contract was made in Penang.

Held, (a) that on the evidence, including the fresh evidence produced before the Court, the Court was not satisfied that a breach of contract had occurred within the jurisdiction and therefore Order 11 Rule 1(e)(iii) of the Rules of the Supreme Court had no application in the case; (b) that the evidence showed that the contract was made in Penang and therefore Order 11 Rule 1(e)(i) applied to the case.

Cases referred to :—

(1) *In re Compton, Norton v. Compton* 27 C.D. 392.

(2) *Spencer v. Ancoats Vale Rubber Company* 58 L.T. Rep. N.S. 363.

(3) *Benaim and Company v. Debono* (1924) A.C. 514.

(4) *British Controlled Oilfields Ltd. v. Stagg* 127 L.T. 209.

CIVIL APPEAL.

C. D. D. Hogan for the Appellants.

Choo Ong Lim for the Respondents.

Willan, C. J. : — The respondents carry on business in Penang, and the appellants are a limited company having a registered office at Negapatam, South India.

In or about December, 1947, as a result of correspondence between the two parties, the respondents shipped to the appellants at Negapatam a consignment of betel-nuts and drew upon the appellants for the price thereof by a bill of exchange. When the goods arrived at Negapatam the appellants refused to accept them and also refused to accept the bill of exchange when presented. Thereupon the respondents had the goods re-shipped to Penang, where they were sold at a price less than the price quoted by the respondents to the appellants. The respondents commenced an action in Penang to recover damages against the appellants for breach of contract, the measure of damages being the difference between the price quoted to the appellants and the price at which the goods were eventually sold in Penang.

The writ was filed on 21st October, 1948, and on the same day the respondents obtained the leave of the Assistant Registrar under Order 11 rule 1(e) of the Supreme Court Rules to serve it out of the jurisdiction on the appellants in South India.

Order 11 rule 1(e) reads :—

> Service out of the jurisdiction of a writ of summons, whether specially indorsed or not, or of notice of a writ of summons, may be allowed by the Court of a judge wherever — .....
>
> (e) the action is one brought against a defendant to enforce, rescind, dissolve, annul, or otherwise affect a contract or to recover damages or other relief for, or in respect of, the breach of contract —
>
> (i) made within the jurisdiction, or
>
> (ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or
>
> (iii) by its terms or by implication to be governed by the law of the Colony, or is one brought in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction.

The appellants, through their solicitors in Penang, entered an appearance — an unconditional appearance — to the writ on 10th November, 1948. The statement of claim was filed by the respondents on 30th November, 1948.

On 5th January, 1949, the appellants made an application by summons in chambers to set aside the order of the Assistant Registrar granting leave to serve the writ out of the jurisdiction.

That application was dismissed by the Judge in the Court below on the ground that though the appellants had ample time in which to adduce evidence before him to refute the evidence put before the Assistant Registrar by the respondents, they had failed to do so. The evidence on which the Assistant Registrar made his order was :—

(a) paragraph 2 of the appellants' affidavit supporting his application for leave to serve the writ outside the jurisdiction, which reads:—

> The breach of the contract on which the abovementioned intended action is founded

occurred within the jurisdiction of this Court, the said goods having been ordered by post by the intended defendants at my place of business at No. 44 Beach Street, Penang, and the payment for such goods should have been made at the said place; and

(b) the indorsement of the claim on the writ, which reads:—

The Plaintiff's claim is for damages for breach of a contract to accept and pay for goods.

Further, after the Assistant Registrar had made his order on that evidence, the respondents filed the statement of claim, paragraph 5 of which reads:—

On December 27th, 1947, the plaintiffs drew upon the defendants a bill of exchange for Rs. 7,108 annas 12 equivalent to $4,520.66 in Malayan currency (at the current rate of exchange) payable to the Indian Bank Ltd., Penang, at sight, which said bill was delivered by the said Indian Bank Ltd., to the defendants and was duly presented for acceptance and was dishonoured by non-acceptance, and was duly protested for the non-acceptance thereof.

In the absence of any evidence by the appellants refuting the respondents' evidence set out above, the Judge in the Court below held that the order for service of the writ outside the jurisdiction was properly made.

It was argued before him, on behalf of the respondents, that since the appellants had entered an unconditional appearance to the writ, they had waived their right to raise any objection to the order for service of it outside the jurisdiction. The Judge made no finding on that question.

When this appeal first came on for hearing on the 14th May, 1949, Mr. Hume, for the appellants, asked the Court to receive further evidence by way of an affidavit deponed to by the Managing Director of the appellants' company.

Further evidence may be given on interlocutory applications without special leave — see section 38(2) Courts Ordinance, 1948, and also *In re Compton, Norton v. Compton*[1], and *Spencer v. Ancoats Vale Rubber Company*[2]. Accordingly that affidavit was ordered by this Court to stand part of the appeal record. The hearing of the appeal was adjourned and liberty given to the respondents to file an affidavit in reply. That reply was filed on 14th May, 1949, and the hearing of the appeal was continued and concluded on 22nd June, 1949.

From the affidavit filed as further evidence by the appellants it is clear that they refused to accept the goods because they considered the price charged, which had not been fixed between the parties, was excessive.

In their further evidence in reply the respondents filed an affidavit deponed to by their managing partner and exhibited several documents attached to that affidavit. The most important of those documents are two telegrams sent by the appellants from Negapatam to the respondents at Penang. The first telegram, dated 20th December, 1947, reads:—

"Ship before December end fifty best Siam big gunnies licence 527 reply".

The second telegram dated 24th December, 1947, reads:—

"Recd reference our cable twentieth please ship goods TALMA Negapatam Port by transhipment Madras (stop) Billady bearing transhipment endorsement reply".

On 25th December, 1947, the respondents shipped the goods c.i.f. from Penang to the appellants at Negapatam. Also exhibited to their affidavit are copies of the invoice, bill of lading and insurance policy.

At the adjourned hearing of this appeal Mr. Hogan, in place of Mr. Hume who had proceeded to the United Kingdom on leave, appeared for the appellants.

In dismissing the application to set aside the order for service of the writ out of the jurisdiction, the Judge in the Court below found that the Assistant Registrar had made the order under Order 11 rule 1(e)(iii) of the Supreme Court Rules — i.e. on the ground put forward in the appellants' affidavit supporting the application for leave to serve the writ outside the jurisdiction, namely that a breach of the contract had occurred within the jurisdiction. On this Mr. Hogan submitted from the further evidence produced before this Court, that the contract is a c.i.f. contract — this is clear; that this information had not been put before the Assistant Registrar when the application for leave to serve the writ outside the jurisdiction came before him; that being a c.i.f. contract the respondents had not performed one of the essential requirements of the contract — namely the tendering of the relevant documents to the applicants at Negapatam in India; and that the breach of the contract occurred at Negapatam — namely the failure of the appellants to accept the goods.

From the evidence on the record, including the further evidence produced before this Court, I am not satisfied that a breach of the contract occurred within the jurisdiction and therefore Order 11 rule 1(e)(iii) has no application in this case.

But it is clear that the two telegrams set out earlier in this judgment constitute an order for goods by the appellants and this was an offer by them to purchase

specific goods from the respondents. They specially asked in both telegrams that the goods be shipped. On receipt of the telegram the respondents shipped the goods in accordance with the offer, and the act of shipping constituted an acceptance by the respondents of the offer made by the appellants. This established the contract between the parties — see *Leake* on Contracts, 8th edition, at pages 10 and 11, where the learned author states :—

> The sending an order for goods to a merchant or tradesman is an offer to purchase; and the sending of the goods is an acceptance of the offer, and creates a contract of sale.

That being so, where was this contract made? In my view it was made in Penang because the final acceptance of the offer — i.e. the shipping of the goods by the respondents in accordance with the directions given by the appellants in their offer — took place in Penang. If authority is needed for that it is to be found in the case of *Benaim and Company v. Debono*[3]. In that case correspondence took place between two merchants regarding the sale of goods. The seller had his place of business in Gibraltar and the buyer in Malta. The final acceptance of the contract was made by the buyer in Malta to the seller in Gibraltar and the latter shipped the goods to Malta f.o.b. Gibraltar. Their Lordships of the Privy Council found from the correspondence an intention between the parties that the law of Gibraltar should apply to the contract but, as regards where the contract was made, they said, (at page 520) :—

> No doubt this contract should be regarded as made in Malta — for thence came the final acceptance by the respondent of the offer made by the appellants.

Accordingly, in the present case, the final acceptance having been made in Penang, and there being nothing in the correspondence to show any intention that the contract should be governed by the law in Negapatam, I find this contract was made in Penang. This brings for consideration Order 11 rule 1 (e) (i) of the Supreme Court Rules. In my view it is clear in its terms that if a contract is made within the jurisdiction and there is a breach of such contract, service of the writ outside the jurisdiction may be allowed.

Mr. Hogan submitted that Order 11 rule 1 (e) (i) only applies to cases where both parties were physically within the jurisdiction when the contract was made. He cited the following passage from page 109 of the 1948 edition of the Annual Practice :—

> Made within the jurisdiction — That is physically within the jurisdiction (**British Controlled Oilfields Ltd. v. Stagg**[4] infra).

He relied on the word "physically" in that passage.

The only reference in the Annual Practice to the report of that case is the Solicitors Journal and, as the Court Library does not contain such Reports, Mr. Hogan was not able to refer to the report of that case. Later, during the hearing of the appeal, I found that this case is also reported in 127 L.T. 209. The facts of that case are that a contract was executed in New York and it was agreed between the parties that it should be considered and held to be one duly made and executed in London, It was held in that case that such a contract was not made within the jurisdiction within English Order XI rule 1 (e) (i), equivalent to our local Order 11 rule 1 (e) (i), but was by its terms or by its implication to be governed by English law and therefore English Order XI rule 1 (e) (iii), equivalent to our local Order 11 rule 1 (e) (iii), applied. In his judgment, Sargant J. held that the contract in that case did not come under English Order XI rule 1 (e) (i) "because it is physically made outside the jurisdiction and because these words" — he was referring to the words 'made within jurisdiction' in English Order XI rule 1 (e) (i) — "do not technically include a contract which by its very terms, is to be deemed to be made within the English jurisdiction although not in fact so made".

Accordingly that case does not support the proposition put forward by Mr. Hogan, and he was unable to cite any other authority.

Therefore I have no doubt that our local Order 11 rule 1 (e) (i) applies to the present case.

Mr. Hogan submitted that this Court should not act under that Order because the ground that the contract had been within the jurisdiction had not been raised before the Assistant Registrar.

It is true that that ground was not raised before the Assistant Registrar, but I am unable to ignore the further evidence put before us on this appeal on the application of the appellants themselves. Having, as of right, asked to place further evidence before this Court and having done so; and the respondents having adduced further evidence in reply, which they were

perfectly entitled to do, it does not lie in the mouth of the appellants to say that we should ignore that further evidence and shut our eyes to it. To do that would be to ignore section 38(1) of the Courts Ordinance, 1948, which reads :—

> Appeals to the Court of Appeal shall be by way of re-hearing, and the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner.

I would therefore confirm the order of the Assistant Registrar and dismiss this appeal.

The question of whether the appellants by entering an unconditional appearance had waived their right to object to the service of the writ outside the jurisdiction was argued. In the view I have taken it is not necessary to decide that point.

As regards costs, the respondents have succeeded on a ground different from that on which they succeeded before the Assistant Registrar and before the Judge in the Court below. That being so I do not think they should have the costs of this appeal. Accordingly I make no order as to costs.

Pretheroe, J. : —I have had the advantage of reading the Judgment of the President. I agree with that Judgment and have nothing to add.

Moor, J. : —I have had the opportunity of reading the judgment written by the Chief Justice. I entirely concur with his judgment and the order proposed and have nothing to add.

Appeal Dismissed.